Before the
Administrative Hearing Commission
State of Missouri

MISSOURI STATE COMMITTEE FOR SOCIAL WORKERS, Petitioner, vs. MICHAEL ARMSTRONG, Respondent.	)	No. 09-1531 SW

DECISION ON REMAND

Michael Armstrong is subject to discipline as a licensed clinical social worker.

Procedure

On November 13, 2009, the Missouri State Committee for Social Workers ("the Committee") filed a complaint to establish cause to discipline Armstrong. On January 5, 2010, we served Armstrong with our notice of complaint/notice of hearing and a copy of the complaint by certified mail. On January 26, 2010, Armstrong filed an answer. We held a hearing on April 12, 2010. Assistant Attorney General Ronald Q. Smith represented the Committee. Armstrong appeared on his own behalf. The case became ready for our decision when the last brief was filed on September 7, 2010.

On March 30, 2011, we issued our decision that Michael Armstrong is not subject to discipline. On April 28, 2011, Petitioner filed a notice of appeal to the Circuit Court of Cole County. On December 20, 2011, the circuit court issued its judgment in case no. 11AC-CC00266. The circuit court reversed in part, finding cause to discipline Armstrong for incompetency and violation of a professional trust or confidence. Accordingly, we do not make findings of fact or conclusions of law with regard to those allegations. The circuit court also remanded in part, finding that this Commission's findings of fact upon which it relied in its decision on the allegations of misconduct and violation of the Committee's regulations were not supported by the record. The circuit court remanded for new findings consistent with the record on these allegations. Accordingly, we make new findings and issue our decision on the remanded allegations.

On May 7, 2013, the Committee filed a document styled "Decision" that, according to a cover letter accompanying it, is a proposed decision in the case. Because it advocates the Committee's position with regard to proposed findings of fact and conclusions of law, we treat it as a supplemental brief, and refer to it as the "proposed decision."

Findings of Fact

1. The Committee licensed Armstrong to practice clinical social work on August 21, 1992. Armstrong's license was current and in good standing from then until the date of the hearing.

2. Armstrong was employed at Ava Counseling Services at all relevant times.

3. K.B., who was 16 years old at the time, started seeing Armstrong for counseling on February 19, 2007.

4. K.B. saw Armstrong for counseling from the beginning of January 2007 until the end of April 2007.

5. Armstrong told K.B. about his previously being accused of statutory rape and sodomy of a client. He told K.B. that the charges were dismissed because the alleged victim couldn't state whether Armstrong had or had not been circumcised.

6. Armstrong also told K.B. that he had married a younger woman, which was advantageous for him sexually because he got to lay there while she did all the work.

7. During a counseling session, Armstrong told K.B. that she needed to experiment with sex in order to have a satisfying sexual relationship with her husband after she got married.

8. Armstrong asked K.B. if she would be willing to have anal sex. When she said no, he asked her if she had been anally violated and, when she said yes, he stated that that would explain her lack of willingness.

9. Armstrong asked K.B. if she had had her tongue pierced for purposes of having oral sex. She said no.

10. Once during a counseling session, K.B. told Armstrong about a scar on her breast that concerned her. While telling Armstrong about her scar, K.B. pulled her shirt over to the side to show Armstrong the scar. Armstrong suggested putting ointment on it.

11. K.B.'s last counseling session with Armstrong was on May 28, 2007.

12. K.B. told her foster mother that she did not want to see Armstrong anymore as a result of the sexual discussions, particularly one where she said that Armstrong asked her to "write a letter to my boyfriend telling him what I wanted him to do in detail on our honeymoon."[1]

13. Armstrong took progress notes of his sessions with K.B.

14. Armstrong's progress notes only obliquely mention sexual issues at all, and do not mention the discussions he had with K.B. on sexual matters.

[1]Tr. at 33. The honeymoon discussion is also discussed under "Comments of a sexual nature" below.

15. K.B.'s foster parents lodged a complaint against Armstrong with the Child Advocacy Center in Springfield, Missouri, on June 15, 2007. This disciplinary proceeding arose from that action.

Conclusions of Law

We have jurisdiction of the complaint.[2] The Committee has the burden to prove facts for which the law allows discipline.[3] Regulations are interpreted as follows:

> Regulations are interpreted under the same principles of construction as statutes. The goal is to ascertain the intent from the language used and to give effect to that intent if possible. Words are given their plain and ordinary meaning. Particular provisions or subsections of a regulation shall not be read in isolation but examined in light of the entire regulation and, if possible, harmonized with that regulation. All of the language contained in the regulation must be given effect; none shall be disregarded.[[4]]

The Committee contends on remand that Armstrong's statements are cause for discipline under § 337.630.2 for:

> (5) [M]isconduct…in the performance of the functions or duties of a social worker licensed pursuant to this chapter;
>
> (6) Violation of, or assisting or enabling any person to violate, any provision of sections 337.600 to 337.689, or of any lawful rule or regulation adopted pursuant to sections 337.600 to 337.689;
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> * * *
>
> (15) Being guilty of unethical conduct as defined in the ethical standards for clinical social workers adopted by the committee by rule and filed with the secretary of state.

The Committee must prove the grounds for discipline by a preponderance of the evidence.[5]

> "Preponderance of the evidence" is defined as that degree of evidence that "is of greater weight or more convincing than the

[2]Section 621.045. Statutory references are to RSMo Supp. 2012.

[3]***Missouri Real Estate Comm'n v. Berger***, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

[4] ***Beverly Enters.-Missouri, Inc. v. Department of Soc. Servs., Div. of Med. Servs***., 349 S.W.3d 337, 352 (Mo. App., W.D. 2008) (internal citations omitted).

[5]***State Board of Nursing v. Berry,*** 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).

> evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not."[6]

The Committee contends that Armstrong's actions violated ethical standards in 20 CSR 2263-3.020, which provides in relevant part:

> (6) A member of the profession shall not engage in any activity that exploits clients, students or supervisees, including sexual intimacies (which means physical or other contact by either the member of the profession or the client) including, but not limited to:
>
> * * *
>
> (E) Exhibitionism and voyeurism (exposing one's self or encouraging another to expose him/herself); and
>
> (F) Comments, gestures, or physical contacts of a sexual nature.

Misconduct

The Committee's complaint, brief, and proposed decision all allege that "Armstrong's conduct…constitutes misconduct in the performance of the functions or duties of a clinical social worker in that [he] acted willfully for his own benefit rather than for the benefit of his client."[7] The Missouri definition of "misconduct," however, is "the willful doing of an act *with a wrongful intention[;] intentional wrongdoing*."[8] (Emphasis added.) With regard to intentional wrongdoing, the Committee's expert, Jonathan Finck, testified as follows:

> Q (by Mr. Smith) Now, if the discussions took place as testified to by K.B., would it be your opinion that these discussions by Mr. Armstrong are a willful doing of an act with a wrongful intention, in other words, that is to say is this an intentional wrongdoing by Mr. Armstrong?
> A As K.B. --
> Q Presented?
> A-- presented, yes.[9]

[6] 32 S.W.3d at 642.

[7] Complaint, ¶ 23; Committee's proposed findings of fact, conclusions of law, and brief, p. 23.

[8] ***Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs v. Duncan***, No. AR-84-0239 Mo. Admin. Hearing Comm'n Nov. 15, 1985) at 125, *aff'd*, 744 S.W.2d 524 (Mo. App., E.D. 1988).

[9] Tr. 71.

By the time Finck gave that testimony, K.B. had testified, but Armstrong had not. Armstrong disputed material portions of K.B.'s testimony, specifically that he did not start the sexual discussions as K.B. testified, but that they were instituted by questions or topics K.B. brought to the sessions to discuss with Armstrong.[10] As we state below under "Violation of Committee regulations," there were matters where KB alleged that Armstrong said something and Armstrong neither admitted nor denied the allegation.

As we stated in our original decision, we found both parties to be, generally, credible. We think the wiser course of action here is to admit that the truth of what was said by whom lies somewhere in the territory between the parties' testimony. And, since the Committee's allegation of misconduct depends on K.B.'s testimony being entirely true and Armstrong's testimony being false to the extent it conflicts with K.B.'s, we cannot say that the Committee has proven that Armstrong acted willfully with a wrongful intention with regard to what Armstrong said.

However, in its proposed decision, the Committee's only argument for misconduct was that it was misconduct for Armstrong *not* to write about the sexual nature of the discussions in his practice notes, as follows:

> It is not credible that a person of Armstrong's intellect and experience would not document his doubts about K.B.'s reported history of sexual abuse, nor document K.B.'s questions of a sexual nature given her reports of this abuse, especially if these discussions had been initiated by K.B. as Armstrong claims. **The only credible explanation is that Armstrong thought he could engage K.B. in these discussions for his own amusement and get away with it**.[11]

The Committee's argument is puzzling: how did Armstrong's *failure* to document the sexual nature of the discussions constitute the commission of a willful act with wrongful intention?

[10] Tr. 130, 8-16; *see also* Tr. 131, 17-25.
[11] Committee's proposed decision, p. 29 (emphasis added).

There seems to be a piece of the argument that is missing (and, having noticed its absence, we reviewed the Committee's complaint and its written arguments to ensure that we did not miss it): how did the failure to document constitute misconduct?

We think the Committee has returned to the global argument it made in its complaint—that the entirety of Armstrong's actions with K.B. constituted misconduct. However, the only testimony supporting the misconduct allegation is Finck's, and it depends on K.B.'s testimony about the sexual discussions being credible and ignoring or disbelieving Armstrong's testimony. Therefore, as before, we find that grounds do not exist to discipline Armstrong's license for misconduct.

Violating a Lawful Rule/Committing Unethical Conduct

The Committee alleges that Armstrong violated the profession's ethical rules, 20 CSR 2263-3.020(6)(E) & (F), by committing voyeurism and making comments of a sexual nature. If Armstrong violated these rules, then he would be subject to discipline under § 337.630.2(6) and (15). As we believe K.B. generally, so too do we believe her testimony that Armstrong's comments and encouraging K.B. to talk about sex made her uncomfortable[12]—but that is not the measure of whether Armstrong violated the ethical rules. Instead, both are measured by the conduct of the licensed professional.

Voyeurism

The Committee's charge of voyeurism arises from K.B.'s allegation that, in the incident during a counseling session, when she told Armstrong about the scar on her breast that she said was caused by prior sexual abuse, then pulled the top of her shirt away from her body to look at it, Armstrong got up out of his recliner and looked down her shirt. Armstrong denied he did such a thing. As with the misconduct allegation, where the Committee's case turns on whether K.B.,

[12] Tr. 15, 1-11.

and not Armstrong, told the truth, we are asked to decide whether discipline is warranted, based on the parties' divergent recounts of what happened.

What is different here is that in this case, the alleged fact (did Armstrong stand up to look, or not?) is more specific. However, that fact is not dispositive of the issue. Armstrong was not charged with standing up out of his chair, or even of looking down K.B.'s top, but of voyeurism. The Committee has provided its own definition of "voyeurism" in 20 CSR 2263-3.020(6)(E): "encouraging another to expose him/herself." To see whether that happened, we reviewed K.B.'s testimony regarding the event, and set it out below:

> Q (by Mr. Smith) Did you have an occasion to discuss a scar that you have?
> A Yes.
> Q Can you describe for me what that conversation was?
> A We were talking about scars physically metaphorically like emotional scars, and we were talking about like getting rid of scars. I said I have one from whenever I was raped that I've always had that I would like to get rid of.
> Q Then what happened?
> A He asked me where it was. I told him it was on my breast.
> Q And then did he respond in any way?
> A Well, he said like how bad was the scar.
> Q And what did you say?
> A I said it's not -- I said it's fairly bad. I just remember that he asked me about it. I looked down my shirt to see because we were talking about it so I looked down my shirt to see.
> Q What did he do at that point?
> A He stood up out of his recliner and looked down my shirt.
> Q Where were you sitting in relation to each other when that occurred?
> A I was sitting on the couch in his office. He was sitting in his recliner.
> Q About how far away was he?
> A Probably about 4 feet.
> Q And when you pulled out your shirt to look at your scar, can you describe how you did that?
> A Yes, I was looking down and I had a V-neck shirt with an undershirt. I just pulled it out to where I could look down. I pulled it out absentmindedly.
> Q Can you describe what Mr. Armstrong did when you pulled your shirt out? Now, did you pull it a long way out? About how far away from your chest did you pull it?

A Just enough to where I could see down it. He was sitting in his recliner and stood up and stood over me. It was like well, let me see how bad it is and looked at it. He's like that's not bad, Mederma could take care of that.
Q What was your response when he did that?
A I thought it was weird.
Q Describe you said you had a V neck on?
A Yes.
Q And an undershirt under it?
A Yes.
Q Can you describe about how many inches maybe below your neck that the V neck went?
A It was about four fingers. So 5 inches maybe.
Q Where was the undershirt beneath that in relation to the V neck?
A It came up the V neck about an inch or two.
Q What else were you wearing?
A I believe I was wearing a skirt.
Q About how long would the skirt have been?
A Ankle length.
Q Was your outfit revealing at the top at all?
A No.
Q When Mr. Armstrong stood up to look at the scar, did he ask your permission --
A No.
Q -- to see it?
A No.
Q Had you offered to show him the scar?
A No.
Q Could the scar have been seen without your pulling the shirt out?
A No.[13]

There is no evidence in that testimony, or anywhere else, that Armstrong *encouraged* K.B. to expose herself. We conclude that Armstrong did not commit voyeurism by the Committee's definition.

Comments of a sexual nature

However, Armstrong made comments of a sexual nature to K.B. While Armstrong defends his conduct by saying he was only answering questions, we note two problems with this argument. First, Armstrong does not cite (and we are not aware of) any obligation he had to

[13] Tr. 28-31.

answer all of K.B.'s questions, regardless of the topic. Rather (and particularly with a minor client such as K.B.), we believe that he had an obligation to guide the discussion so as to keep it away from salacious or prurient areas. Put another way, it would be foolish for a teenager's counselor to let the teenager dictate how sexual their discussions were.

Furthermore, Armstrong appeared to let the sexual discussion go on without supervision, and to be given the chance to talk about his own sexual history and practices. K.B. alleged that the topics she discussed with Armstrong included premarital sexual experimentation,[14] oral sex,[15] anal sex,[16] whether she was a "technical virgin,"[17] and whether K.B. had had her tongue pierced for purposes of oral sex.[18] K.B. alleged that Armstrong brought up all of those issues. He denied having brought up some of them, but said nothing about the others.

Armstrong volunteered information about his own sexual experience, including a prior statutory rape and sodomy charge brought against him (that, he asserted, had been defeated because the victim could not say whether or not he had been circumcised),[19] and that he had had the good fortune to marry a younger woman, which enabled him to lie there "while she did all the work."[20] Also, K.B. alleged that he asked her to write a letter describing, in full detail, what she wanted to do with her boyfriend on the night of their honeymoon.[21] Armstrong's version was that he had asked K.B. to write down a fantasy version of what her wedding (not her wedding night, or honeymoon) would be like.[22]

Regardless of the specifics of the discussions, we conclude that Armstrong did make comments of a sexual nature to K.B. Furthermore, we conclude that the comments he made

[14] Tr. 25, 20-25.
[15] Tr. 26, 6-22.
[16] Tr. 27, 2-14; Tr. 31, 10-12.
[17] Tr. 27, 21-25, Tr. 28, 1-15.
[18] Tr. 44, 17-24.
[19] Tr. 37, 15-17.
[20] Tr. 35-36.
[21] Tr. 46-47.
[22] Tr. 135, 1-3.

were, at least, questionable. But did they *exploit* K.B.? Unlike "voyeurism," where the Committee provided a definition, where a word is not defined in statute (or in this case, a regulation), we give it its common sense, dictionary meaning.[23] The non-legal dictionary definition of "exploit" is, "to make use of meanly or unfairly for one's own advantage."[24]

The only evidence supporting the Committee's claim of exploitation is Finck's testimony, as follows:

> Q (by Mr. Smith) If the conduct was as presented by K.B., is it your opinion that it appears to have been therapeutic or solely for Mr. Armstrong's own gratification?
> A It would appear to be for self gratification.[25]

Again, Finck's testimony was offered before Armstrong had the chance to give his side of the discussions he held with K.B. And to be sure, Armstrong provided explanations for much of his conduct. He asserted that the sexual discussions were driven by what K.B. wanted to talk about and the questions she asked him. His reason for bringing up the accusations of statutory rape and sodomy against him was so she would hear about it from him first. He didn't ask her to share a fantasy of her wedding night, but of her wedding.

But even assuming that everything Armstrong said was true, there is no doubt but that he encouraged K.B. to discuss sex with him. He didn't deny that:

- he told her that she needed to experiment with sex in order to have a satisfying sex life with her husband;
- he had married a younger woman, which was advantageous for him sexually because he "got to lay there while she did all the work;"
- he told her that she needed to experiment sexually, so as to have a satisfying sex life with her husband once she married;

[23] ***State v. Trotter***, 5 S.W.3d 188, 193 (Mo. App., W.D. 1999).
[24] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 441 (11th ed. 2004).
[25] Tr. 72.

- he asked her whether she had had anal sex; and
- he asked her whether she had had her tongue pierced for purposes of oral sex.

We agree with Finck that these discussions had no therapeutic purpose. What is left is to determine whether we agree with his conclusion that he did them for self-gratification, and whether that constitutes exploitation. It is tempting to simply agree with Finck (and the Committee), simply because we find Armstrong's role in the discussions to be not only non-therapeutic, but inappropriate.

But the ethical standard forbidding exploitation of clients includes within the scope of exploitation sexual intercourse, sodomy, kissing, touching of the client's body, exhibitionism, and gestures or physical contacts of a sexual nature, in addition to comments of a sexual nature. Applying the statutory rule of construction *noscitur a sociis*, that a word is known by the company it keeps, we must conclude that Armstrong's sexual comments did not rise to the level of egregious behavior set out by the other acts listed in 20 CSR 2263-3.020(6)(F). Furthermore, a review of cases from other states yields no cases whose facts are related to those here, i.e., that the professional's mere words constituted sexual exploitation. Therefore, we cannot say that Armstrong exploited K.B. according to the Committee's regulation.

We therefore find no cause for discipline under § 337.630.2(5), (6), or (15).

Summary

Armstrong is not subject to discipline for misconduct, violating a lawful rule, or committing unethical conduct as defined in the ethical standards for clinical social workers adopted by the Committee by rule and filed with the Secretary of State. As previously held by

the Circuit Court, he is subject to discipline for incompetency and violation of a professional trust or confidence.

SO ORDERED on September 10, 2013.

\s\ Nimrod T. Chapel, Jr.
NIMROD T. CHAPEL, JR.
Commissioner